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No. 87-393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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58pp

QUESTION PRESENTED

Whether the mere execution of a bilateral stock purchase agreement which is expressly subject to the condition precedent of approval by agencies of the federal and state governments and which approvals are mandated by statute converts the agreement into a unilateral option to purchase stock presently electable by buyer (i) despite failure to receive the required governmental approvals at execution and (ii) despite the violation of law such conversion would cause, and (iii) despite the contrary intent and understanding of all parties to the agreement, and (iv) despite all undisputed facts found by the trial court?

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Central Transport, Inc., et al., ("Central Transport")[1] files its Brief in Opposition to Petition for Writ of Certiorari ("Petition") of Central States, Southeast and Southwest Areas Pension Fund, et al. ("Pension Fund").

OPINIONS BELOW

The opinions of the District Court for the Eastern District of Tennessee are reported at 639 F. Supp. 788 and 640 F. Supp. 56 and are set forth in Appendices A and B. An amended judgment

[1] A list of all parties to this proceeding is accurately set forth in the Petition, Page 1n.1. The list of Respondents also conforms to the corporate affiliate requirement of Rule 28.1 of the Rules of the Supreme Court of the United States. Repetition is unnecessary pursuant to Rules 22 and 28.1 of the Rules of the Supreme Court of the United States.

appears in Appendix C. The *per curiam* opinion of the Court of Appeals, which affirmed the opinions of the District Court for all the reasons stated therein, is unpublished and is set forth in Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1987. A petition for rehearing *en banc* by Petitioner was denied on June 5, 1987 (Appendix E). Jurisdiction of this Court is invoked by Petitioner under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1242 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§1381-1462 ("MPPAA").

STATEMENT OF THE CASE

The Pension Fund seeks review based upon a fabricated dichotomy between Sections 414(c) and 1563 of the Internal Revenue Code[2] and upon an imagined conversion of a bilateral stock purchase agreement into a unilateral option to purchase. In truth, this is a simple matter which may be disposed of upon undisputed facts peculiar to this case. Reconsideration would not advance the understanding of MPPAA.

The Pension Fund demanded from Respondents $26,295,533.26 in MPPAA withdrawal liability because 5 truck drivers ("Five Tank Lines Employees") employed by The Mason and Dixon Tank Lines, Inc. ("Tank Lines") decertified the Teamsters Union as their collective bargaining agent. Thereafter

[2] 26 U.S.C. §§414(c), 1563.

the Pension Fund *refused* to allow the Five Tank Lines Employees to participate in the Pension Fund.[3]

Under the Pension Fund's own theory, Respondents cannot be liable unless they were the "employer" of the Five Tank Lines Employees on December 31, 1983. Tank Lines, not Respondents, was the *actual* employer of the Five Tank Lines Employees. Consequently, Respondents cannot be deemed the "employer" unless Respondents were part of a controlled group of corporations, as defined in the Internal Revenue Code, including Tank Lines on December 31, 1983 ("Withdrawal Date"). *See* 29 U.S.C. §1301(b). Respondents could not have been in a controlled group of corporations with Tank Lines on December 31, 1983 unless Respondents were the owners on that date of Tank Lines or its corporate parent The Mason and Dixon Lines, Incorporated ("Mason & Dixon").

However, the Pension Fund was forced to admit at District Court that Central Transport did not own Mason & Dixon until February, 1985. Accordingly, the Pension Fund was forced to assert that Central Transport should be "deemed" fictional or "constructive" owner of Mason & Dixon although not its legal owner. Under the Pension Fund's theory, ownership was acquired by Central Transport upon the execution of a purchase agreement to acquire the stock of Mason & Dixon (the "Stock Purchase Agreement"). The Pension Fund asserted that the Stock Purchase Agreement was actually a unilateral option to buy in favor of Central Transport which contained provisions giving Central Transport effective control over Mason & Dixon on the date of execution.

The District Court concluded that the Stock Purchase Agreement was not an option. The Pension Fund had offered

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[3]The Five Tank Lines Employees requested Tank Lines to tender all past due contributions on their behalf to the Pension Fund so that they could be reinstated as Pension Fund participants. Tank Lines tendered the money but the Pension Fund refused to reinstate the Five Tank Lines Employees. The Pension Fund preferred the opportunity to grab at a windfall of money rather than to maintain the pensions of five of its former participants.

absolutely no proof to the contrary; depositions of buyer and seller alike demonstrated without exception that no facts supported the Pension Fund's theory. The buyer and seller under the Stock Purchase Agreement did not intend the agreement to be an option. The very terms of the Stock Purchase Agreement prevented Central Transport as buyer from purchasing or controlling Mason & Dixon prior to receiving approval of the intended purchase and change of corporate control from the Interstate Commerce Commission ("ICC") and the various state regulatory agencies in the 11 states in which Mason & Dixon and Tank Lines conducted intrastate business ("State Regulatory Authorities"). 49 U.S.C. §§11343, 11349. Moreover, federal and state law prohibited Central Transport from purchasing or controlling Mason & Dixon prior to receiving governmental approvals *even if* the Stock Purchase Agreement had not required prior approval. Those approvals were not forthcoming until long after December 31, 1983.

The following undisputed calendar of events destroys the Pension Fund's theory that Respondents owned or controlled Mason & Dixon and Tank Lines on December 31, 1983:

1983	
November 29	Decertification vote by Five Tank Lines Employees. Also date of Stock Purchase Agreement.
December 21	Central Transport applies for ICC approval to purchase Mason & Dixon stock.
December 31	Collective bargaining agreement expires for Local 71.
1984	
January 4	Central Transport receives ICC approval to temporarily operate Mason & Dixon pending decision of ICC on whether the purchase will be allowed.
January 9	Central Transport begins operating Mason & Dixon.
March 7	ICC approves Central Transport's acquisition of Mason & Dixon stock.
November 9	Central Transport receives last of state regulatory approvals (Kentucky).
1985	
January	Mason & Dixon stockholders sue *inter alia* over purchase price calculations.
February	Central Transport tenders purchase price and receives stock of Mason & Dixon.

REASONS FOR DENYING THE PETITION

The Pension Fund asserts that Respondents have partially withdrawn from the Pension Fund under ERISA §4205(b)(2)(A)(i) which defines a partial withdrawal as when:

> the *employer* permanently ceases to have an obligation to contribute under one or more but fewer that all collective bargaining agreements under which the *employer* has been obligated to contribute . . . .

29 U.S.C. §1385(b)(2)(A)(i) (emphasis added). Only an employer can withdraw from a multiemployer pension plan. ERISA §4201(a), 29 U.S.C. §1381(a). ERISA allows collection of withdrawal liability only from the "employer" of the employees who have lost their participation in the pension plan. ERISA §4219, 29 U.S.C. §1399. All notice and collection provisions in ERISA §4219 relate only to the "employer". Consequently, Respondents cannot be liable for the asserted $26 Million withdrawal liability unless they were the "employer" of the Five Tank Lines Employees on December 31, 1983.

1. The Petition Should Be Denied Because The Decisions Of The Courts Below Are Based Upon The Admissions Of The Pension Fund That Respondents Were Not The Owners Of Mason & Dixon On The Withdrawal Date.

Under the Pension Fund's theory, Respondents are in a controlled group of corporations which includes Tank Lines and thereby are liable as "employer" of the Five Tank Lines Employees only "if a mechanical, objective stock ownership test is satisfied." Petition, Page 3. The Pension Fund asserts that "[t]his test may be met through the 'direct' or 'constructive' ownership of a requisite percent of stock (80%) by corporations or shareholders related in a specified manner." Petition, Page 3.

The Pension Fund was forced to admit before the District Court that Respondents did not own Mason & Dixon on December 31, 1983:

> Central Transport . . . did not consummate the Stock Purchase Agreement until February 1, 1985.[4]

Counsel for the Pension Fund has further admitted that Central Transport's ownership of Mason & Dixon did not occur until the Stock Purchase Agreement was consummated:

> It is my understanding that the purchase agreement has not been consummated and therefore, Mason & Dixon stock is not owned by Central Transport or any of the other affiliates in the Central Transport group.[5]

Thus, the provisions of the Stock Purchase Agreement and the undisputed facts peculiar to this case prohibit finding Respondents liable. (Memorandum and Order, Appendix A at 20a). In addition, the Stock Purchase Agreement was subject to approval of the ICC and the State Regulatory Authorities both under the express terms of the Stock Purchase Agreement and by statute. Accordingly, the Federal District Court Judge Hull correctly held:

> It is beyond dispute that the agreement did not receive final approval by the I.C.C. until early 1984, and Central Transport did not become the actual owner of Mason Dixon's stock until February, 1985.

Appendix A at 5a.

Judge Hull's ruling that the Stock Purchase Agreement was subject to contractual and statutory conditions precedent and did not amount to constructive ownership is amply supported by case law and administrative interpretations. An option to acquire stock under Internal Revenue Service Regulations does not exist if the stock is not presently electible by the holder of the option. *See,*

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[4]The Pension Fund's Brief In Opposition To Summary Judgment filed in the District Court, Appendix F at 35a.

[5]Letter dated October 1, 1984 from Elizabeth Roberto, attorney for the Pension Fund, to John E. Young, attorney for Mason & Dixon, Appendix G at 39a.

e.g., Mid-America Industries, Inc. v. United States, 341 F.Supp. 597, 607 (W.D. Ark. 1972), *rev'd on other grounds,* 477 F.2d 1029 (8th Cir. 1973) (to constitute an option to purchase stock, the rights in question must enable the holder to purchase the stock "presently at his election"); Rev. Rul. 68-601 (the holder of a warrant must have the right to obtain the stock at his election for the warrant to qualify as an option); Rev. Rul. 77-201 (convertible preferred stock is considered to be an option to acquire stock of the issuing corporation within the meaning of Section 1091 of the Internal Revenue Code [26 U.S.C. §1091], because such stock is convertible at the shareholder's election *and there are no restrictions with respect to that election);* G.C.M. 30367 (November 15, 1957) ("[I]t is not believed that an agreement within the meaning of Section 318 [26 U.S.C. §318] can constitute an option to purchase when the rights to acquire the stock are dependent on contingencies without control of the buyer . . . in such cases, the interest of the perspective purchaser would seem to be too remote to constitute an option for which attribution would be justified"). Indeed, the Pension Fund's citation to G.C.M. 35176 demonstrates that serious conditions precedent beyond the control of the taxpayer preclude the formation of an option to purchase stock. Petition, Page 19 n.16.[6]

The Pension Fund now states totally without factual support that ". . . neither Central Transport nor [Mason & Dixon] seriously believed that the ICC would deny permanent authority". Petition, Page 27. That statement is an outrage. There is not one shred of evidence to support it. Contract litigation would soar if a rule were established in which the subjective intentions of contracting parties determined whether an objective condition prece-

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[6]The only other Circuit Court of Appeals decision that applies the constructive ownership analysis to MPPAA *does not* conflict with the decisions below. In *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.,* 788 F.2d 118 (3d Cir. 1986), the court held that an option to acquire stock existed under a unique set of facts. The contract to purchase the shares of *Barker & Williamson* was *not* subject to any conditions precedent. Accordingly, the option holder could presently elect to consummate the transaction simply by payment of the purchase price.

dent mandated by federal statute was a "substantial contingency". Contract interpretation would turn on the silent hopes of the contracting parties rather than the objective criteria negotiated by those parties. The rule the Pension Fund would have this Court adopt would virtually destroy the certainty of contracts.

2. The Petition Should Be Denied Because Federal And State Statutes And Undisputed Facts Prohibit Respondents From Being Deemed The "Constructive" Owners Of Mason & Dixon.

Since Respondents did not own Mason & Dixon, the Pension Fund was forced to argue that somehow Respondents "constructively" owned the stock through actual control over Mason & Dixon.

> The District Court succinctly summarized and dismissed this argument:
>
> > Defendant [the Pension Fund] asserts, however, that even though Central Transport was prohibited from owning Tank Lines until 1984, a date subsequent to the alleged triggering event, it nevertheless exercised control over Tank Lines prior thereto. Thus, [the Pension Fund] argues, Tank Lines was part of the Control Group [with Respondents] prior to the triggering event which prompted this withdrawal liability assessment. Unfortunately for [the Pension Fund], two factors militate heavily against their theory of "control" by Central Transport.

Appendix A at 5a.

The first is that the Interstate Commerce Act prohibits the exercise of any control by an acquiring corporation prior to a preliminary ICC approval. 49 U.S.C. §§11343, 11349. Appendix A at 6a. This is conceded by the Pension Fund at Page 23 of its Petition. That approval was not served upon Central Transport until January 4, 1984 — that is *after* the Withdrawal Date.

> The second factor was based entirely upon facts found by the District Court:

> . . . [The Pension Fund] is unable to point to any evidence which would support its contention that Central Transport was in control of Tank Lines as of December 31, 1983.

Appendix A at 6a.

The District Court made that decision after discussing with the Pension Fund's counsel each provision that the Pension Fund alleged had given Central Transport control over Mason & Dixon. Before issuing its opinion, the District Court reviewed the extensive discovery by the Pension Fund of both buyer and sellers under the Stock Purchase Agreement which showed conclusively that no option was intended, negotiated or drafted between the parties.

Whether an option existed is important only to show whether Central Transport could exercise a sufficient degree of control over Mason & Dixon to somehow be deemed its owner. It is an undisputed fact that Central Transport was legally barred from exercising any such control before the Withdrawal Date and in fact did not exercise any control before the Withdrawal Date. The District Court found:

> Central Transport did not acquire Mason Dixon's stock until February, 1985, and it does not appear that they manifested any control over Mason Dixon or Tank Lines prior to January 4, 1984. In fact, Central Transport was prohibited from exercising control prior to January 4, 1984 by the I.C.C.

Appendix A at 6a-7a.

This Court should not issue its Writ of Certiorari to review the fact finding of the District Court judge. Respondents were barred by statute and the terms of the Stock Purchase Agreement from owning or controlling Mason & Dixon until after December 31, 1983.

CONCLUSION

The Pension Fund is attempting to collect $26,295,533.25 — because five men became dissatisfied with their union in Charlotte, North Carolina. The Pension Fund concedes that the $26 Million liability has nothing to do with the five men — they are simply the excuse employed to seek a windfa'l profit.

Only an employer is liable for withdrawal liability. The Mason and Dixon Tank Lines, Inc. was the actual employer of the Five Tank Lines Employees. The Pension Fund asserts that Central Transport and Respondents should also be deemed the employer on the Withdrawal Date — December 31, 1983.

Central Transport did not and by law could not own The Mason and Dixon Tank Lines, Inc. or its corporate parent, The Mason and Dixon Lines, Incorporated, until long after December 31, 1983.

The District Court below allowed the Pension Fund to conduct depositions of Central Transport's officers, the buyer's counsel, the sellers (the King Family), the sellers' counsel, the tax expert employed by Mason & Dixon and the former President of Mason & Dixon. The Pension Fund also reviewed hundreds of pages of documents and filed numerous briefs before the Court below and propounded requests for admissions.

Despite all of this discovery and argument, the Pension Fund has been unable to show that the Stock Purchase Agreement was anything other than what the parties to it intended, *i.e.*, a contract to purchase stock arising upon fulfillment of conditions precedent by disinterested third-party government agencies — the Interstate Commerce Commission and the State Regulatory Authorities in the various states in which Mason & Dixon conducted its business.

The Stock Purchase Agreement was not a unilateral option in favor of Central Transport allowing it to purchase Mason & Dixon's stock from the King Family at will. It was a bilateral agreement with conditions precedent to its enforceability negoti-

ated at arms length by buyer and sellers and fulfilled or not fulfilled by the Interstate Commerce Commission and the State Regulatory Authorities.

The Courts below thoughtfully considered and analyzed the briefs and evidence submitted by both parties and concluded that Respondents were not members of a controlled group of corporations with Mason & Dixon and Tank Lines on the Withdrawal Date. This case can be decided on its facts alone. There is no conflict among the Circuit Courts. This case is simply not of Supreme Court timber.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Memorandum and Order of the District Court, January 17, 1986

Appendix A

(FILED JAN. 17, 1986)
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

CENTRAL TRANSPORT, INC., *ET AL.*

v. NO. CIV-2-85-470

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *ET AL.*

and

THE MASON AND DIXON TANK LINES, INC.

v. NO. CIV-2-85-471

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *ET AL.*

and

MICHIANA TRUCKING, INC., *ET AL.*

v. NO. CIV-2-85-472

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *ET AL.*

MEMORANDUM

This action came before the Court for a hearing on plaintiff's motion for a preliminary injunction. Plaintiffs seek protection in this action from imposition of a Twenty-six ($26) million dollar withdrawal liability assessment by defendant, based on the withdrawn participation from the union pension plan of a single

bargaining unit within Mason & Dixon Tank Lines which resulted from this bargaining unit's decertification of the union.

The court has carefully considered the record and the oral arguments made by counsel and will issue a preliminary injunction for the reasons set forth below.

Under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub.L. No. 96-364, Congress empowered multiemployer pension funds to assess "withdrawal liability" on an employer withdrawing from participation in the fund. The Pension Fund (Fund) is able to assess withdrawal liability against an employer when there is a partial withdrawal of participation. 29 U.S.C §1381. Under the statutory scheme, a partial withdrawal occurs when "the employer permanently ceases to have an obligation to contribute [to the Fund] under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute . . . ." 29 U.S.C §1385 (b) (2) (A) (i).

The calculation of "withdrawal liability" which is assessed based upon a partial withdrawal, is not limited to the unfunded vested benefits of the employees that precipitated the partial withdrawal, but allows the fund to include in this calculation other unfunded vested benefits, related to the employer, for which the Fund would not otherwise be allowed to assess.

In the present case, Mason & Dixon Tank Lines (Tank Lines) ceased to have an obligation to make Fund contributions on behalf of the employees within the bargaining unit which decertified the union. This particular bargaining unit of Tank Lines is made up of five employees. These five employees voted the union out on November 29, 1983, and terminated their status under union contracts on December 31, 1983. The Fund has asserted withdrawal liability, based upon this triggering event (the withdrawal of the Tank Lines bargaining unit), against some twenty other businesses that are allegedly part of a group of

businesses, including Tank Lines, that are under common control. The statute provides that all employees of trades or businesses which are under common control will be treated as if they were employees of a single employer with all of the commonly controlled businesses making up the single employer. 29 U.S.C. §1301 (b) (1). Since this "Control Group" is the "employer" under the statute, withdrawal liability is calculated based upon the contribution history of all members of the "Control Group", and this is how the Fund arrived at the $26 million figure for which it seeks to hold each member of the alleged Control Group jointly and severally liable.

Plaintiffs in this action have disputed this assessment of withdrawal liability; and, under the statute, disputes over withdrawal liability are resolved by arbitration.[1] 29 U.S.C. §1401 (a) (1). The statute also provides that the Fund may schedule payments on the withdrawal liability, and that the employer is required to make such payments pending the resolution of any dispute over the liability. 29 U.S.C. §1401 (d). In this action the Fund is seeking an order compelling the plaintiffs to make interim monthly payments of $548,571.67. Plaintiffs seek a preliminary injunction to prohibit defendant from attempting to collect the withdrawal liability alleged to be due and owing until the plaintiffs' liability in this matter is established.

In making the determination as to whether a preliminary injunction should issue, the Court is directed to consider four factors:

1. Whether there is a substantial likelihood of success on the merits;

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[1] As is subsequently discussed in this Memorandum, the Court has found that arbitration is not a jurisdictional prerequisite to the maintenance of this action.

Appendix A

2. Whether the moving party will be irreparably damaged if the injunction is not issued;

3. Whether issuance of the injunction would cause substantial harm to others; and

4. Whether the public interest would best be served by the issuance of the preliminary injunction. *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982).

As to the first factor, the Court finds that plaintiffs have demonstrated a substantial likelihood of success on the merits. This determination is based primarily upon the issue of whether Tank Lines was part of the Control Group at the time of withdrawal from the Fund by the five employees. The critical date here is December 31, 1983, the date the five-member collective bargaining unit ceased to operate under union contract. If Tank Lines was under the control of plaintiff, Central Transport, Inc., at that time, then Tank Lines was part of the alleged Control Group, and the withdrawal liability asserted by the Fund would stand on a much stronger factual basis. However, although Central Transport had entered into an agreement for the purchase of Mason & Dixon Lines, Inc., the parent of Tank Lines, this agreement was subject to approval by the I.C.C. It is beyond dispute that the agreement did not receive final approval by the I.C.C. until early 1984, and Central Transport did not become the actual owner of Mason Dixon's stock until February, 1985.

Defendant asserts, however, that even though Central Transport was prohibited from owning Tank Lines until 1984, a date subsequent to the alleged triggering event, it nevertheless exercised control over Tank Lines prior thereto. Thus, defendant argues, Tank Lines was part of the Control Group prior to the triggering event which prompted this withdrawal liability assessment. Unfortunately for defendant, two factors militate heavily against their theory of "control" by Central Transport.

First, the Interstate Commerce Act prohibits the exercise of any control by the acquiring corporation prior to the issuance of preliminary I.C.C. approval. 49 U.S.C. §11343, 49 U.S.C §11349. The I.C.C. decision which allowed Central Transport to begin to exercise control over Mason Dixon and Tank Lines pending a final decision by the I.C.C., was not served until January 4, 1986. Thus, Central Transport was prohibited by law from exercising any control over Tank Lines prior to January 4, 1986. The Sixth Circuit has indicated that withdrawal liability will not be enforced against the purchaser of a corporation when its operation was beyond the purchaser's control. *In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983).

Second, defendant is unable to point to any evidence which would support its contention that Central Transport was in control of Tank Lines as of December 31, 1983. Defendant points to provisions in the purchase agreement which limit the actions that may be taken by Mason Dixon and Tank Lines from the date of execution of the agreement until the date Central Transport is given approval to exercise control. Paragraph 11, Stock Purchase Agreement.[2] These provisions, however, merely prevent Mason Dixon and Tank Lines from depriving Central Transport of the benefit of its bargain by requiring maintenance of the status quo. Included are provisions such as: the equipment will be maintained ¶11.3, the capital structure will not be altered ¶11.5.6, etc., and Central Transport is allowed to inspect and make certain that such changes are not occurring. The Court is unable to find any delegation of control to Central Transport in these provisions.

Central Transport did not acquire Mason Dixon's stock until February, 1985, and it does not appear that they manifested any control over Mason Dixon or Tank Lines prior to January 4, 1984. In fact, Central Transport was prohibited from exercising control

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[2] The Stock Purchase Agreement is found as Exhibit B to Central Transport's brief in support of motion for a preliminary injunction.

prior to January 4, 1984 by the I.C.C. Therefore, it appears that Tank Lines was not part of the alleged Control Group at the time of withdrawal. If Tank Lines was not part of the Control Group, the withdrawal liability which might be assessed by the Fund would be *de minimus*.[3] Since the withdrawl liability asserted by the Fund appears to be based on an erroneous conclusion, plaintiffs have demonstrated a substantial likelihood of success on the merits.

The Court also finds that plaintiffs will be irreparably damaged if an injunction is not issued. Plaintiffs have asserted that the imposition of such a liability would basically force all businesses concerned to shut down and liquidate. Although such drastic results are not certain, it is certain that the existence of a non-contingent[4] $26 million liability will impair the credit of each of the plaintiff companies, as well as their customer confidence.[5] Such an impairment will inhibit the ability of these businesses to operate, and may indeed result in their demise, even though the Fund's assessment may be wrong. Destruction of the plaintiffs as going concerns is irreparable damage.

On the other hand, the Fund would not be impaired by the issuance of the preliminary injunction. Its existence is not threatened by the delay in collecting the withdrawal liability.

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[3] Counsel for defendant intimated at oral argument that if withdrawal liability were limited to Tank Lines, the Fund would probably not pursue its collection.

[4] The statute provides that the withdrawal liability determination by the Fund is presumed proper. 29 U.S.C. §1401 (a) (3) (A). It is on this basis that the fund is able to compel payment of the withdrawal liability even though arbitration of such a determination is pending. 29 U.S.C. §1401 (d).

[5] The United States District Court for the Eastern District of New York found irreparable damage in the assessment of withdrawal liability. "Such a claim, whether valid or not, sends a signal to people in the industry that the company in question is out of business." *Time-DC, Inc.*, v. *Trucking Employees of North Jersey Welfare Fund*. 560 F. Supp. 294, 304 (E.D.N.Y. 1983).

Counsel for plaintiffs has asserted that the Fund's 1984 Annual Report reveals surplus income of $386 million out of total income of $2.058 billion. This assertion was not contradicted at the hearing by defendant. It is apparent, therefore, that the fund faces no threat from delay in collecting what will, at most, be a $26 million assessment. This is actually only a small portion of the Fund's total income, and enjoining its collection will not prevent the payment of any vested pension obligations, particularly when one considers that it was to be paid in monthly installments of approximately $500,000.00 over a period of years. Thus, the Court finds that issuance of the injunction will not cause substantial harm to others.

Finally, although the public interest does not form a substantial portion of the basis for this decision, the Court does find that the public interest would best be served by enjoining the enforcement of this withdrawal liability. It is in the public interest to protect the viability of private businesses when the protection will not prejudice other parties, and when the threat to their viability rests upon questionable grounds.

Accordingly, the defendant will be enjoined from pursuing collection of the $26 million withdrawal liability from any of the plaintiffs.

The plaintiffs also seek a preliminary injunction to prohibit the defendants from commencing an arbitration proceeding pursuant to the provisions of 29 U.S.C. §1401(a)(1) against the plaintiffs. Although defendants argue that arbitration is the proper method to resolve this dispute over the payment of withdrawal liability which defendants have assessed against the plaintiff, the exhaustion of an arbitration process is not a prerequisite to district court jurisdiction.

The issue of requiring arbitration as a prerequisite has been addressed in *I.A.M. National Pension Fund Benefit Plan C* v. *Stockton Tri Industries*, 727 F.2d 1204 (D.C. Cir. 1984), which

involved an action brought by a pension fund to collect withdrawal liability under the Multiemployer Pension Plan Amendment Act of 1980. After finding that exhaustion of the arbitration process was not a jurisdictional prerequisite, the Court in *Stockton, supra* at 1209-1210, then found that as a prudential matter it was also proper for the district court to proceed on the merits for two reasons.

First, the court found that it was proper for the district court to proceed on the merits, because the issue before the court was "purely one of statutory interpretation." *Stockton, supra* at 1210. Although the facts in *Stockton* were undisputed, the legal significance of those facts was hotly disputed. In this respect, the case at bar is similar to *Stockton*, because in both cases the interpretation of a critical statutory provision in regard to certain undisputed facts will determine whether or not withdrawal liability exists. Whereas the pivotal statutory term in *Stockton, supra* at 1205, was "complete withdrawal", in the case at bar, the Court must look at the terms "employer" and "controlling group".

Second, in *Stockton*, the court looked at the likelihood that requiring arbitration would promote judicial economy by resolving the dispute extrajudicially. The Court found in *Stockton, supra* at 1210, that under the specific circumstances present there, it was "unlikely in the extreme" that arbitration would resolve the dispute. In the case at bar, because the plaintiff, Central Transport, Inc., insists they have no withdrawal liability; and the plaintiff, Mason and Dixon Tank Lines, Inc., only admits a *de minimus* withdrawal liability, while the defendants claim withdrawal liability of $26,295,533.25, it is also extremely unlikely that arbitration could result in an award which would satisfy all parties. In that event, either party is entitled to bring an action in this court to vacate the arbitrator's award. 29 U.S.C. §1401(b)(1). Therefore, judicial economy would not be served by requiring exhaustion of the arbitrative remedy.

Appendix A

If the plaintiffs are not part of the controlling group or an employer of Tank Lines within the meaning of MPPAA, then obviously there would be no duty to arbitrate. This would be analogous to whether or not there is a contractural duty to arbitrate [See *Refined Sugars* v. *Loc. 807 Labor-Manage. Pens. Fund*, 580 F.Supp. 1457 (D.C.N.Y. 1984)]; and the Supreme Court has held that a judicial determination that a contract did create a duty to arbitrate must precede a compulsory submission to arbitration. *See*, e.g., *John Wiley & Sons., Inc.* v. *Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964); *Atkinson* v. *Sinclair Refining Co.*,, 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.E.2d 1409 (1960).

Therefore, because this case involves a statutory interpretation to determine the legal significance of facts which are basically undisputed, and because judicial economy would not be served by requiring arbitration, this court has jurisdiction to hear this case on the merits.

Once jurisdiction has been established, the All Writs Act, 28 U.S.C. §1651, gives the Court the power to enjoin the repetitive litigation of the same issue. *Redac Project 6426, Inc.* v. *Allstate Ins. Co.*. 412 F.2d 1043 (2nd Cir. 1969);/ *State of Michigan* v. *City of Allen Park*, 573 F.Supp. 1481 (D.C. Mich. 1983).

Inasmuch as an arbitration proceeding would relitigate the same issues involved in this case, and because the arbitrator's award could be contested at a later point in this court, 29 U.S.C. 1401(b)(1), it would not be in the public interest or conducive to judicial economy for such a proceeding to be commenced and carried forward.

Appendix A

Therefore, to prevent repetitive litigation of the same issue, the defendant will be enjoined from commencing and prosecuting an arbitration proceeding involving the same issues at bar.

ENTERED: (SIC)

(s) Thomas G. Hull
United States District Judge

Appendix A

(FILED JAN. 17, 1986)
IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

CENTRAL TRANSPORT, INC.,
ET AL

v. NO. CIV-2-85-470

CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS PENSION
FUND, *ET AL*

and

THE MASON AND DIXON TANK
LINES, INC.

v. NO. CIV-2-85-471

CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS PENSION
FUND, *ET AL*

and

MICHIANA TRUCKING, INC.,
ET AL

v. NO. CIV-2-85-472

CENTRAL STATES, SOUTHEAST
AND SOUTHWEST AREAS PENSION
FUND, *ET AL*

ORDER GRANTING PRELIMINARY INJUNCTION

The Court, having reviewed the materials filed and having heard the arguments of counsel for the respective parties at Greeneville, Tennessee, on Friday, January 10, 1986 at 9:00 a.m., finds and orders as follows:

Appendix A

1. Plaintiffs would be financially and otherwise irreparably harmed if forced to pay withdrawal liability payments as presently calculated and defendants would not be harmed by issuance of an injunction.

2. The public interest and judicial economy would be served by enjoining arbitration during the pendency of these actions.

3. Defendants admitted that Michiana Trucking/Michiana Leasing are not liable for the withdrawal liability, the assessment of which is described in No. CIV-2-85-472.

Accordingly, in order to preserve the *status quo ante*, this Court:

A. Enjoins defendants and their agents, attorneys, representatives, employees and all other persons acting in concert with or at the direction of defendants, who receive actual notice of this Order, including the American Arbitration Association, preliminarily and during the pendency of the actions before this Court, from:

(1) Prosecuting, enforcing, collecting or accelerating the withdrawal liability claim which is the subject of these actions ("Claim") from plaintiffs or any of its joint and several obligors to which it would owe contribution.

(2) Declaring plaintiffs in default of any obligation or that they have waived any rights and procedures under MPPAA or Employees Retirement Income Security Act ("ERISA").

(3) Prosecuting the claim in arbitration against the plaintiffs, including, but not limited to, taking any action to select or nominate any arbitrator or otherwise proceeding with the arbitration commenced by letter dated January 7, 1986 to the American Arbitration Association.

B. Stays all time periods under MPPAA and ERISA for the commencement and prosecution of arbitration during the pendency of the actions before this Court.

Inasmuch as the matter of requiring security rests in the discretion of the Court, the Court has required no injunction bond at this time. However, if the defendants are of the opinion that they could be damaged if it is later determined that the injunction was improvidently issued, they can move for the requirement of an injunction bond in a reasonable amount within ten (10) days of the entry hereof, and introduce proof thereon.

A copy of this order shall be served by certified or registered mail upon the American Arbitration Association, 205 West Wacker, Suite 1100, Chicago, Illinois 60606; and that American Arbitration Association be and hereby is preliminarily enjoined, during the pendency of this action, from taking any further steps in or in furtherance of the arbitration commenced by Central States Southeast and Southwest Areas Pension Fund letter dated January 7, 1986, from Tom J. Frawley, Director, concerning the "Centra Group withdrawal liability", File No. 51-621-0002-86 MEPPA/F.

ENTER:

(s) Thomas G. Hull
United States District Judge

APPENDIX B

Memorandum and Order of the District Court, March 5, 1986

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

CENTRAL TRANSPORT, INC., *ET AL*

v. No. CIV-2-85-470

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREA PENSION FUND, *ET AL*

MEMORANDUM AND ORDER

This action came before the Court for a hearing on plaintiffs' motion for summary judgment. The Court has carefully considered the record and the oral arguments made by counsel and finds that the plaintiffs' motion for summary judgment is well taken for the reasons hereinafter set out.

The plaintiffs, Central Transport, Inc., et al, contend that since their purchase of Mason and Dixon Lines stock was contingent upon ICC approval pursuant to the provisions of both their stock purchase agreement and 49 U.S.C. §11343, they did not own or control Mason and Dixon Lines or Tank Lines on the date of decertification of Tank Lines on December 31, 1983 as a matter of law, because ICC approval was not received until January 4, 1984. Therefore, plaintiffs have moved for summary judgment that they are not liable for withdrawal liability.

The defendant, Pension Fund, in its brief contends that three facts are undisputed: (1) Central Transport and GLS LeasCo are affiliates and are the wholly-owned subsidiaries of plaintiff, Cen-Tra, Inc.; (2) Mason and Dixon Tank Lines was and still is the wholly-owned subsidiary of Mason and Dixon Lines; and (3) by virtue of two stock purchase agreements dated November 29, 1983, Central Transport and GLS LeasCo acquired the exclusive right to purchase (together) one hundred percent (100%) of the

stock of Mason and Dixon Lines and Mason and Dixon Tank Lines. Defendant's brief further acknowledges that (a) Central Transport, Inc. received temporary authority from the ICC in regard to this sale on January 4, 1984 with permanent authority being received from ICC on March 7, 1984; and (b) prior to their acquisition by Central Transport, Inc., and GSL LeasCo, Crown Enterprises, Mason and Dixon Lines, and Mason and Dixon Tank Lines were owned and controlled by members of the King family of Kingsport, Tennessee.

Based upon these facts, and by applying the provisions of 26 U.S.C. §414(c), the defendant contends that the withdrawal liability assessment of $26,000,000.00 against the plaintiffs, Central Transport, Inc., *et al.* was proper. The defendants further contend that based on the theory of constructive ownership, as set out in 26 U.S.C. §414(c), Tank Lines was a member of the "controlled group" consisting of the plaintiffs on December 31, 1983 by virtue of the stock purchase agreement executed on November 29, 1983.

Although the defendant is correct that whether or not plaintiffs, Central Transport, Inc., *et al.* had constructive ownership of Mason and Dixon Lines stock will be dispositive of liability, based upon the stock purchase agreement and the undisputed facts of the case as given by the defendant, the application of 26 U.S.C. §414(c) as argued by the defendant would still entitle the plaintiffs to summary judgment. Although §414(c) is applicable to this case, a thorough examination of several statutes as well as applicable case law is necessary to reach a final decision in this matter.

The provisions of 29 U.S.C. §1301(b)(1) in regard to Pension Benefit Guaranty Corporations provide:

> For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common

> control shall be treated as employed by a single employer and all such trades and businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under *section 414(c)* of Title 26. (emphasis added).

In turn, 26 U.S.C. §414(c) provides that corporations which are under common control shall be treated as employed by a single employer and states that:

> The regulations prescribed under this subsection shall be based on principles similar to the principles which apply in the case of subsection (b).

In referring to 26 U.S.C. §414(b), a controlled group of corporations is defined as within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C). Therefore, the definitions and special rules as given under 26 U.S.C. §1563 are applicable to controlled group plan termination liability.

The applicability of §1563 has also been discussed in *Pension Ben. Guaranty Corp. v. Quimet Corp.*, 711 F.2d 1085, 1094 (1st Cir. 1983), *cert. denied*, 104 S.Ct. 393 (1983), in which the Court states:

> The principles of I.R.C. §1563(a)(2) are relevant to controlled group plan termination liability because ERISA defines an employer in terms of the regulations promulgated under I.R.C. § 414(c). 29 U.S.C. § 1301(b)(1) (Supp. V 1981); *see supra* note 6 (text of provision). I.R.C. § 414(c) and the related regulations define controlled groups of businesses using the principles of the I.R.C. § 1563 definitions. *See* generally Comment, *Extending ERISA Liability for Pension Plan Termination to Controlled Group Members: Pension Benefit Guaranty Corp. v. Quimet Corp.*, 61 B.U.L.Rev. 477, 491-02 (1981) (suggesting that the differ-

ence between section 1563 and section 414 is that the latter encompasses unincorporated as well as incorporated entities in the controlled group definitions and thus includes Trust).

In the case at bar, because the defendant contends that stock ownership is dispositive, 26 U.S.C. §1563(d)(1), which specifically deals with both direct and constructive ownership of *stock* is more on point than §11.414(c)-4, which generally defines ownership of *"interests."*

The applicable rules to determine stock ownership under §1563(a), as set out in 26 U.S.C. §1563(d)(1), are as follows:

> Parent-subsidiary controlled group.—For purposes of determining whether a corporation is a member of a parent-subsidiary controlled group of corporations (within the meaning of subsection (a)(1)), stock owned by a corporation means—
>
> > (A) stock owned directly by such corporation, and
> > (B) *stock owned with the application of subsection (e)(1)*. (emphasis added).

Stock ownership under 26 U.S.C. §1563(e)(1) is defined as follows:

> (e) Constructive ownership. — (1) Options. — If any person has an option to acquire stock, such stock shall be considered as owned by such person. For purposes of this paragraph, an option to acquire such an option, and each one of a series of such options, shall be considered as an option to acquire such stock.

In the case at bar, the defendant contends that withdrawal liability would be properly assessed against the plaintiffs, Central Transport, Inc., *et al.* by virtue of its constructive ownership of one hundred percent (100%) Mason and Dixon Lines stock,

because plaintiff's stock purchase agreement executed on November 29, 1983 was an option.

The Court in *Mid-America Industries, Inc. v. United States*, 341 F.Supp, 597 (D.C. Ark. 1972) reversed on other grounds 477 F.2d 1029, has defined the term "option" to purchase stock for the purposes of determining a "controlled group" unded 26 U.S.C. §1563(e)(1). In finding that a "Condition" was not an option under §1563(e)(1) because certain contingencies existed over which the holder of the "Condition" had no control, the Court held "that to constitute an option to purchase stock, the rights in question must enable the holder to purchase the stock 'presently at his election'." *Mid-America Industries, Inc., supra*, at 607.

In the case at bar, pursuant to both the stock purchase agreement and 49 U.S.C. §11343, ICC approval was a specific contingency in regard to the purchase of Mason and Dixon Lines, Inc.; and the plaintiff had no control of this contingency. Therefore, under the facts of this case, the stock purchase agreement was not an option; the plaintiffs had no constructive ownership of Tank Lines; and there can be no resulting withdrawal liability on the basis of the defendants' theory of constructive ownership.

In the event that the Court had adopted the view that the stock purchase agreement was in fact an option, the defendant's case would still fail if 26 U.S.C. §1563(f)(3)(B) and the I.R.C. regulations applicable to controlled groups and options are applied. The special rules of 26 U.S.C. §1563(f)(3)(B) provide:

> If stock is owned (within the meaning of subsection (d) by *two or more persons*, such stock shall be considered as owned by the person whose ownership of such stock results in the corporation being a component member of a controlled group. If by reason of the preceding sentence, a corporation would (but for this sentence) *become a component member of two controlled groups*,

> *it shall be treated as a component member of one controlled group.* The determination as to the group of which such corporation is a component member shall be made under regulations prescribed by the Secretary which are consistent with the purposes of this part. (emphasis added).

Under 26 CFR §1.1563-3(d), the special rule in regard to §1563(f)(3)(B) is given as follows:

> (2) *Component member of more than one group.* (i) If, by reason of subparagraph (1) of this paragraph, a corporation would (but for this subparagraph) become a component member of more than one controlled group on a December 31, such corporation shall be treated as a component member of only one such controlled group on such date. The determination as to which group such corporation is treated as a component member of shall be made in accordance with the rules contained in subdivisions (ii), (iii), and (iv) of this subparagraph.
>
> (ii) In any case in which a corporation is a component member of a controlled group of corporations on a December 31 as a result of treating each share of its stock as owned only by the person who owns such share *directly*, then each such share shall be treated as owned by the person who owns such share *directly*. (Emphasis added).

The following example is given to illustrate the application of this rule:

> *Example (1):* Jones owns all the stock of corporation X and has an option to purchase from Smith all the outstanding stock of corporation Y. Smith owns all of the outstanding stock of corporation Z. Since the Y stock is considered owned by two or more persons, under subparagraph (2)(ii) of this paragraph the Y

> stock is treated as owned only by Smith since he has direct ownership of such stock. 26 CFR §1.1563-3(d)(3).

Therefore, assuming that Central Transport, Inc., *et al.* did, in fact, have constructive ownership by virtue of an option to purchase Mason and Dixon stock and Tank Lines, and that the King family had direct ownership of this stock and Tank Lines, pursuant to 26 U.S.C. §1563(f)(3)(B) and 26 CFR §1.1563-3(d)(2)(ii), Tank Lines can only be in one controlled group and would be considered to be a component member of a controlled group of corporations held by the King family because the King family was the *direct* owner of the stock in question on December 31, 1983. Consequently, withdrawal liability would properly be assessed against the King Family's controlled group rather than the plaintiffs, Central Transport, Inc., *et al.*

The defendant also contends that in the event that an equitable construction of §414(c) is applied pursuant to the guidelines of *IN RE Challange Stamping and Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983), which seems to require a showing of actual control, that equities would also dictate the assessment of withdrawal liability against the plaintiffs. Inasmuch as this issue has been pretermitted, because an equitable construction of §414(c) has not been applied in this case, the necessity of the defendant showing actual control of Mason and Dixon Lines by the plaintiffs is not necessary to reach a decision in regard to withdrawal liability. However, based upon the briefs and argument of counsel, the entire record, including various depositions and affidavits, as well as the fact that temporary authority to take control of Mason and Dixon Lines was not granted to the plaintiff by the ICC until January 4, 1984, the Court finds that actual control was not established by the defendant on the part of the plaintiffs as of December 31, 1983. Therefore, the plaintiffs would still be entitled to summary judgment on the issue of withdrawal liability using the defendant's equitable theory.

Appendix B

It is, therefore, the ruling of the Court that the stock purchase agreement did not constitute an option; that Tank Lines was not a component member of the controlled group of corporations on December 31, 1983 held by Central Transport, Inc., *et al;* that the plaintiffs, Central Transport, Inc., *et al,* are consequently not liable for the withdrawal liability amount assessed; and that the plaintiffs' Motion for Summary Judgment is well taken and is hereby GRANTED.

ENTERED: (SIC)

(s) Thomas G. Hull
United States District Judge

APPENDIX C

Amended Judgment of the District Court, May 2, 1986

Appendix C

(FILED MAY 2, 1986)
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE

CENTRAL TRANSPORT, *et al*

v.

CENTRAL STATES, ETC., *et al*

AMENDED JUDGMENT IN A CIVIL CASE

CASE NUMBER: CIV-2-85-470

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the stock purchase agreement did not constitute an option; that Tank Lines was not a component member of the controlled group of corporations on December 31, 1983 held by Central Transport, Inc., et al; that the plaintiffs, Central Transport, Inc., et al are consequently not liable for the withdrawal liability amount assessed; and that the plaintiffs' Motion for Summary Judgment is well taken and is granted and defendants are permanently enjoined, pursuant to the findings supporting this judgment, from any attempt to assess or collect withdrawal liability from the plaintiffs in this action in connection with the partial withdrawal that occurred at Mason & Dixon Tank Lines as a result of the decertification of Local 71 by a five-member bargaining unit at the North Carolina facility of Tank Lines on November 29, 1983 and the subsequent expiration of the collective bargaining agreement covering these employees on December 31, 1983.

May 2, 1986
Date

(s) Karl D. Saulpaw, Jr.
Clerk

(s) Elaine Milligan
(By) Deputy Clerk

APPENDIX D

Opinion of the Court of Appeals, April 17, 1987

Appendix D

(FILED APRIL 17, 1987)
NOT FOR PUBLICATION
NOS. 86-5222/86-5599
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CENTRAL TRANSPORT, INC.; BANCROFT TRUCKING COMPANY; C.T. TRANSPORT, INC.; C.T. TRANSPORT, INC.; CENTRA, INC.; CENTRAL CARTAGE COMPANY, INC.; CENTRAL-ON-LINE DATA SYSTEMS, INC.; CENTRAL RECAPPING, INC.; THE CROWN ENTERPRISES, INC.; CRUISER TOURS, INC.; AMBRI, INC.; FLINT CARTAGE COMPANY; GLS LEASCO, INC.; GENERAL HIGHWAY EXPRESS COMPANY; MCKINLAY TRANSPORT, LTD.; MICHIGAN EXPRESS, INC.; MOHAWK MOTOR, INC.; PORT SIDE TRANSPORT, INC.; ROETHLISBERGER TRANSFER; SUPERIOR FORWARDING COMPANY, INC.; CONSOLIDATED FORWARDING; AND MOHAWK CARTAGE,

Plaintiffs-Appellees.

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND LORAN W. ROBBINS; MARION M. WINSTEAD; ROBERT C. SANSONE; R. JERRY COOK; HOWARD MCDOUGALL; ROBERT J. BAKER; R. V. PULLIAM, SR.; AND ARTHUR H. BUNTE, JR., IN THEIR CAPACITY AS TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Decided and filed

BEFORE: JONES, KRUPANSKY AND BOGGS, Circuit Judges.

Appendix D

PER CURIAM. The defendants, Central States, Southeast and Southwest Areas Pension Fund and its Trustees (the defendants or the Fund), appealed from the district court's orders granting a preliminary injunction and summary judgment in favor of the plaintiffs, twenty-two companies, all of which were admittedly under common control prior to November 29, 1983, in this action challenging the Fund's assessment of over $26 million in pension withdrawal liability pursuant to the Multiemployer Pension Plan Amendments Act of 1980 (the MPPAA).

For purposes of the MPPAA, all employees of trades or businesses which are under common control, known as a controlled group, are treated as if they were employees of a single employer consisting of all of the commonly controlled businesses. The MPPAA authorizes multiemployer pension funds such as the defendant to assess "withdrawal liability" for unfunded vested benefits against all companies within a controlled group upon the withdrawal of any one of the companies within the controlled group from participation in the particular fund. Withdrawal liability is calculated upon the aggregate contribution history of all members of the controlled group. A partial withdrawal from the fund occurs when a single participating company of a controlled group permanently ceases to have an obligation to contribute into the fund under one or more but fewer than all collective bargaining agreements under which that single company had previously been obligated to contribute.

The record in the instant case disclosed that on November 29, 1983, two of the plaintiffs, Central Transport, Inc. (Transport) and its affiliate GLS LeasCo, Inc. (LeasCo), executed two stock purchase agreements with the shareholders of Mason & Dixon Lines, Inc. (Mason & Dixon), whereby Transport and LeasCo acquired the exclusive contractual right to purchase all of the outstanding shares of Mason & Dixon's stock, as well as that of its wholly owned subsidiary, Mason & Dixon Tank Lines, Inc. (Tank Lines). Consummation of the stock purchase was contin-

gent upon the ultimate approval of the transaction by the Interstate Commerce Commission (ICC). On December 31, 1983, Tank Lines, the subsidiary of Mason & Dixon, incurred partial withdrawal liability under the MPPAA by virtue of the expiration and nonrenewal of a collective bargaining agreement between it and five of its employees, represented by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America Local Union No. 71 (Local 71), under which agreement Tank Lines had previously contributed to the Fund. On January 4, 1984, Transport received ICC temporary authority to operate Mason & Dixon, subject to further ICC review, which operational control it assumed on January 9, 1984. Permanent ICC authority to operate Mason & Dixon was granted to Transport on March 7, 1984 together with approval of the stock acquisitions, which stock purchase agreements with Mason & Dixon were not ultimately consummated until February 1 and 2, 1985.

Between the dates of July 22 and August 31, 1985, the defendant Fund assessed plaintiffs Transport, LeasCo, and the other plaintiff members of the controlled group for partial withdrawal liability in an amount in excess of $26 million, calculated upon the aggregate unfunded vested benefits and contribution history of all plaintiffs. The withdrawal liability was assertedly triggered on December 31, 1983 with the expiration of the collective bargaining agreement between Tank Lines and five of its employees, represented by Local 71, and the failure to renew the collective bargaining agreement due to the employees' earlier decertification of Local 71 as bargaining agent. The plaintiffs challenged the assessment administratively and also initiated this action in federal district court, while the Fund sought to initiate arbitration of the matter as provided by the MPPAA. The district court in a published decision initially granted the plaintiffs' motion for a preliminary injunction enjoining the Fund from proceeding to arbitration of the dispute. *Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 639 F.Supp. 788 (E.D. Tenn. 1986). The district court reasoned that

the traditional criteria governing the issuance of preliminary injunctive relief, more particularly the probability of success on the merits of the controversy and the likelihood of irreparable harm, weighed heavily in favor of the plaintiffs, and further concluded that the controlling issues joined by the pleadings were legal and not factual and were, accordingly, not properly the subject of arbitration under the MPPAA.

In a second published decision, the district court granted summary judgment in favor of the plaintiffs. *Central Transport, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 640 F.Supp. 56 (E.D. Tenn. 1986). The dispositive substantive issue before the district court was the status of Tank Lines as a member of the plaintiff controlled group on the date of Tank Lines' partial withdrawal from the defendant Fund on December 31, 1983, and the consequent partial withdrawal liability, if any, that attached to all members of the plaintiffs' controlled group as a result of Tank Lines' partial withdrawal from the Fund.[1] The district court observed that, despite the execution of the stock purchase agreements between Transport, LeasCo, and Mason & Dixon on November 29, 1983 prior to the date of Tank Lines' withdrawal from the Fund on December 31, 1983, the ICC had not issued to Transport and LeasCo either the requisite operational control over Mason & Dixon and Tank Lines nor had it ultimately approved the stock acquisitions as required by law until January 4 and March 7, 1984, respectively. The district court concluded that, absent actual operational control and actual or constructive ownership of Mason & Dixon's and Tank Lines' stock by Transport and LeasCo, Tank Lines was not a member of the plaintiffs' controlled group on the withdrawal date, and the plaintiffs were therefore not subject to withdrawal liability.

---

[1] It was conceded by the parties that Tank Lines and Mason & Dixon had incurred partial withdrawal liability as a result of the action between Tank Lines and Local 71 on December 31, 1983.

Appendix D

The Fund's separate notices of appeal from the two decisions of the district court have been consolidated into the instant appeal. Having examined the record on appellate review in its entirety and having considered the briefs and arguments of the parties, this court is of the view that the district judge correctly identified the considerations applicable to disposition of the instant dispute. Accordingly, for the reasons articulated in its published opinions, the judgment of the district court is AFFIRMED.

APPENDIX E

Order of the
Court of Appeals Denying
Preliminary Rehearing *en banc*

Appendix E

(FILED JUNE 5, 1987)
No. 86-5222/5599

UNITED STATES COURT OF APPEALS
FOR THE SIXTH COURT

CENTRAL TRANSPORT, INC., ET AL.,
Plaintiffs-Appellees.

v.

ORDER

CENTRAL STATES, SE AND SW AREAS
PENSION FUND, ET AL.,
Defendants-Appellants

BEFORE: JONES, KRUPANSKY and BOGGS, Circuit Judges

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman, *Clerk*

APPENDIX F

Excerpt from
Defendants' Brief in Opposition to
Plaintiffs' Motion for Summary Judgment

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

CENTRAL TRANSPORT, INC., et al.,
Plaintiffs,

Case No. CIV-2-85-470

vs.

CENTRAL STATES, et al.,

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

* * * *

(page 4)

. . . was in *operational control of the company* for all but eight days. (Central Transport admits taking operational control of Mason and Dixon Lines on January 9, 1984)

The basis of Plaintiffs' Motion for Summary Judgment is that Central Transport and its pre-acquisition affiliates could not have been the "employer" on the date of withdrawal because ICC (and state regulatory) approval was required before Central Transport could 1) exercise *actual control* of Mason and Dixon's operations (under temporary authority); 2) *consummate the stock purchase agreement* (under permanent authority). Central Transport did not receive temporary authority until January 4, 1984,[2] did not receive permanent authority until March 7, 1984,

[2]Central Transport filed an application for temporary authority to operate and control Mason and Dixon on December 21, 1983 (Exhibit 3). The ICC granted this authority on December 27, 1983 (Plaintiffs' Exhibit I) although the approval order was not served and filed until January 4, 1984. Discovery has revealed that on January 4, 1984, a "get acquainted" meeting between owners and executives of Central Transport (a Michigan corporation) and their counterparts at Mason and Dixon was held at the Hilton Hotel in Troy, Michigan (Exhibit 4). This meeting included the Kings and most of the 14 Vice Presidents of Mason and Dixon. Mr. R. Payton, Executive Vice President and later President of Mason and Dixon, stated in a deposition taken on February 6,

Appendix F

(page 4 continued)

and did not consummate the stock purchase agreement until February, 1985. These facts do not justify summary judgment in favor of Plaintiffs.

First, the cases are unanimous that *actual control of operations* is not the standard or test Congress utilized to establish membership in a controlled group for purposes of ERISA. *See PBGC v. Dickens*, 534 F. Supp. 922 (W.D. Mich. 1982), *aff'd sub nom., In re Challenge Stamping & Porcelain Co.*, 719 F.2d 146 (6th Cir. 1983); *PBGC v. Ouimet Corp.*, 630 F.2d 4 (1st Cir. 1980), 711 F.2d 1085 (1st Cir. 1983); *Western Dominion Coal Co. and UMW 1950 and 1974 Pension Plans*, 6 EBC 2353 (Arb. Gordon, 1985, Exhibit 5). Reference to a putative "employer's" lack of "actual . . .

1986 that he was advised of this meeting by Mr. J. King, who phoned him about *two days earlier from Michigan*. This testimony gives rise to the inference that Central Transport was monitoring the ICC procedures and that all parties to the stock purchase agreement were aware of the grant of approval prior to the date it was given, i.e., prior to December 31, 1983 and prior to January 4, 1984.

APPENDIX G

Letter Re: Mason & Dixon
(October 1, 1984)

Appendix G

LETTER RE: MASON AND DIXON LINES

[Letterhead: Law Offices Of Russell N. Luplow]

October 1, 1984

John E. Young, Esq.
Fitzgerald, Young, Peters, Dakmak & Bruno
25th Floor City National Bank Building
Detroit, Michigan 48226

Re: Mason and Dixon Lines

Dear Mr. Young:

I have read *Bittner vs. Borne Chemical Company, Inc.* and will prepare a statement of the issue for my client; a response will not be forthcoming for some time, however. Nevertheless, there does not appear to be any reason for delay in the formulation of a plan of reorganization since I have already represented that Central States' claim could be deemed withdrawn without prejudice or discharge upon plan confirmation.

I would like to point out, however, that even if Central States were to agree to a zero value for purposes of voting, the withdrawal liability problem would not be solved. The problem is really one of feasibility. If an employer experiences a contribution decline in excess of 70% for a period of 3 years, there has been a partial withdrawal pursuant to the provisions of the Multi-Employer Pension Plan Amendments Act amending ERISA. Without actually calculating the decline for 1984 in regard to the contribution level of Mason Dixon, the level of operations has been such that a 70% decline could be anticipated. Of more

concern is the present indication that operations of Mason Dixon will be sharply curtailed in the future. There have been no projections as to the future operations of the company and to date, according to information that the debtor has provided, only 12 terminal locations have been reopened and only a handful of Mason Dixon's former employees have been recalled to work.

Even if a plan of reorganization is confirmed which provides for payment to the unsecured creditors over a period of time, the triggering of a partial withdrawal at the end of December, 1986, would result in an assessment against Mason Dixon of approximately $18 million. Needless to say, the company could not afford to make a payment of this kind and continue to fund the provisions of the confirmed plan.

If Mason Dixon were part of the Central Transport control group, in other words, a trade or business under common control as provided in 29 USC Sec. 1301(b), a complete withdrawal would not occur unless all of the Central Transport control groups cease to have an obligation to contribute. Moreover, the entire Central Transport control group would have to experience a 70% decline in contributions over a period of 3 years in order for there to be a partial withdrawal. It is my understanding that the purchase agreement has not been consumated and therefore, Mason Dixon stock is not owned by Central Transport or any of the other affiliates in the Central Transport group.

Appendix G

As soon as I know my client's position on the question you raised regarding valuation of the contingent claim for withdrawal liability, I will inform you of that position. In the meantime, if you have any questions, please do not hesitate to contact me.

Very truly yours.

(s) Elizabeth Roberto

ER/ewb

cc: Mr. George Psaras
Mr. Herbert Falk
Mr. Richard Hutson